

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of )  
HELEN C. DUNHAM and ESTATE OF )  
SAM B. DUNHAM DECEASED, WILLIAM M. )  
DUNHAM AND BERRY C. DUNHAM, SURVING )  
JOINT EXECUTORS )

Appearances:

For Appellants: William T. Huston, Attorney at Law

For Respondent: Crawford H. Thomas, Associate Tax Counsel

O P I N I O N

These appeals are made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on protests against proposed assessments of additional personal income tax for the year 1954 against Helen C. Dunham in the amount of \$1,322.75 and against Hal M. Dunham, William M. Dunham and Berry C. Dunham, Co-executors of the Estate of Sam B. Dunham, Deceased, in the amount of \$1,055.75.

For some time prior to April 1, 1953, Sam B. Dunham held a contract giving him the exclusive right to sell food and drink at the Del Mar race track. On or before April 1, 1953, he transferred the contract to a partnership composed of himself as a general partner and Hal M. Dunham, William M. Dunham and Berry C. Dunham as limited partners. The partnership adopted a fiscal year ending March 31. Sam Dunham and his wife, Helen C. Dunham; reported their income on a calendar year basis.

On October 5, 1954, Sam Dunham died and Hal M. Dunham, William M. Dunham and Berry C. Dunham became the executors of his estate. A separate return was filed on the decedent's behalf for the period from January 1, 1954, to October 5, 1954, and his widow, Helen C. Dunham, filed a separate return for the calendar year 1954.

The Federal income tax authorities conducted an audit of the decedent's final return. The results of the audit, insofar as they relate to the issues in these appeals, were that (1) certain \$30,000 annual payments by the partnership to Sam Dunham were treated as distributive shares of partnership income rather than as capital gains on a purported sale of the Del Mar contract to the partnership and (2) the partnership was treated as

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terminated on the date of the decedent's death, requiring the inclusion in the decedent's final return of his share of the partnership income for the period April 1, 1954, to October 5, 1954, as well as his share of the partnership income for the partnership's fiscal year ended March 31, 1954. The Federal matter was ultimately settled by a stipulation under which the \$30,000 payments were regarded as ordinary income but the partnership was not considered as terminated on the date of the decedent's death.

Based upon the Federal audit, Respondent in 1958 issued the notices of proposed assessments which are in dispute. Unlike the provisions of the stipulation, Respondent treated the partnership as terminated at the date of the decedent's death for California income tax purposes. The notices were addressed to Helen C. Dunham, proposing to tax her on her community share of the income, and "Hal M. Dunham, William M. Dunham and Berry C. Dunham, Co-executors of the Estate of Sam B. Dunham." The executors had been discharged from their duties by a superior court in 1957.

The three questions to be decided in these appeals are (1) Was the transfer of the Del Mar contract to the partnership a sale or a contribution of assets? (2) Was the decedent's share of the partnership income for the period April 1, 1954, to October 5, 1954, includible in his return for the period January 1, 1954, to October 5, 1954? (3) Are the executors subject to liability for any taxes which are due?

(1) With respect to the first issue, Appellants allege that decedent sold the Del Mar contract to the partnership for \$510,000, to be paid in \$30,000 annual installments over the life of the contract, and that the payments should therefore be treated as capital gains.

Respondent's finding that the contract was the decedent's contribution to the newly formed partnership is prima facie correct and Appellants have the burden of showing that it was erroneous. (Cal. Admin. Code, Tit. 18, § 5036; Todd v. McColgan, 89 Cal. App. 2d 509 [201 P. 2d 414]; Appeal of Nicholas H. Obritsch, Cal. St. Bd. of Equal., Feb. 17, 1959, 2 CCH Cal. Tax Cas. Par. 201-252, 3 P-H State & Local Tax Serv. Cal. Par. 58154.) Appellants have not presented a copy of any agreement under which the Del Mar contract was transferred to the partnership, a copy of the articles of partnership or testimony by any of the partners as to the nature of the transfer. Upon the record before us, we cannot find that the amounts received by or on behalf of the decedent were payments made pursuant to a sale of the Del Mar contract. We must uphold the position of Respondent on this point.

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(2) On the second issue, Appellants argue that none of the partnership income for the period commencing April 1, 1954, was taxable until March 31, 1955, the end of the partnership's fiscal year.

Under the laws of California relating to partnerships generally, a partnership is considered dissolved by the death of a partner and, in the absence of an agreement to the contrary, each partner is entitled to an account of his interest at that time. (Corp. Code, §15031, 15043; Harvey v. Harvey, 90 Cal. App. 2d 549, 554 [203 P. 2d 112].) Sections 18301 et seq. of the Revenue and Taxation Code, which provided for the taxation of partnership income during the period in question, did not set forth express rules covering the death of a partner. Interpreting substantially identical provisions of the Internal Revenue Code of 1939, however, the United States Supreme Court has held that upon the death of a partner, his share of the income earned up to that time is includible in his return for the period ending with his death. (Guaranty Trust Co. v. Commissioner, 303 U.S. 493 [82 L. Ed. 975 '71].) There was a divergence of opinion in the Federal courts as to the effect of a provision in the partnership agreement calling for continuation after the death of a partner, but there was no such provision in the case before us.

Section 706(c) of the Internal Revenue Code of 1954 altered the rule so that the partnership did not terminate for tax purposes upon a partner's death. This change was effective for taxable years beginning after December 31, 1953, and ending after August 16, 1954, the date the act was passed. (1954 Int. Rev. Code, § 7851(a)(1)(A).) The stipulation which Appellants entered into with the Federal authorities was thus consistent with the Federal statute. A comparable statute, Section 17863, was added to the California Revenue and Taxation Code in 1955. Since this amendment was applicable only to taxable years beginning on or after January 1, 1955, it has no effect on the instant matter.

The Del Mar track season was completed by the time of the decedent's death, and it thus appears that all or most of the partnership income for the fiscal year April 1, 1954, to March 31, 1955, was earned before the date of his death. Appellants, in any event, have not established that Respondent included an excessive amount of the partnership income in the decedent's final return.

(3) Appellants William M. Dunham and Berry C. Dunham, the surviving executors of the decedent's estate, contend that they are not liable for the decedent's taxes because they were discharged from their duties by a superior court before the notice of proposed assessment against them was issued. Respondent contends that they are personally liable under Section 19265 of the Revenue and Taxation Code.

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The considerations thus raised were passed upon by us in Appeals of Margaret P. Woerner and Estate of Max C. Woerner, Deceased, Cal. St. Bd. of Equal., April 25, 1962, CCH Cal. Tax Rep. Par. 201-917; 3 P-H State & Local Tax Serv. Cal. Par. 58233. We there stated that:

... The fact that the proposed assessment was issued after the estate was distributed and the administratrix was discharged does not compel a conclusion that the proposed assessment was void, at least in the absence of a showing that Respondent was properly notified of the discharge. (Rev. & Tax, Code, § 19261; Sanborn v. Helvering, 108 F. 2d 311; Tooley v. Commissioner, 121 F. 2d 350.)

Respondent argues that, pursuant to Section 19265 of the Revenue and Taxation Code, Margaret Woerner is personally subject to any tax liability resulting from the 1951 assessment against the Estate of Max Woerner. Section 19265 provides that any fiduciary who pays any claim against an estate or who distributes the assets of an estate before he pays the personal income tax imposed on the estate is personally liable for the tax,

In so far as is relevant to the problem at hand, Section 19265 is identical to Section 3467 of the Revised Statutes of the United States (31 U.S.C. § 192). It has been established by the Tax Court that the question of the personal liability of a fiduciary may not be considered in a proceeding based upon a notice of deficiency directed to the estate or to the fiduciary in his representative capacity and not in his personal capacity. (Estate of L. E. McKnight, 8 T.C. 871; Estate of Theodore Geddings Tarver, 26 T. c. 490, 498, aff'd 255 F. 2d 913.)

Since the proposed assessment in question was issued against the executors in their representative capacity, as "Co-executors of the Estate of Sam B. Dunham," the issue of their personal liability is not properly before us. The assessment against them in their representative capacity, however, is valid, since there is no showing that Respondent was properly notified of their discharge.

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O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on protests against proposed assessments of additional personal income tax for the year 1954 against Helen C. Dunham in the amount of \$1,322.75 and against Hal M. Dunham, William M. Dunham and Berry C. Dunham, Co-executors of the Estate of Sam B. Dunham, Deceased, in the amount of \$1,055.75, be and the same is hereby sustained.

Done at Sacramento, California, this 1st day of October, 1963, by the State Board of Equalization.

<u>John W. Lynch</u>	, Chairman
<u>Geo. R. Reilly</u>	, Member
<u>Paul R. Leake</u>	, Member
<u>Richard Nevins</u>	, Member
<u>                    </u>	, Member

ATTEST: H. F. Freeman, Secretary